IN THE SUPREME COURT OF MISSOURI

Supreme Court No. SC 85084

TRACEY L. FARMER-CUMMINGS
Employee/Appellant

v.

PERSONNEL POOL OF PLATTE COUNTY
Employer/Respondent

SUBSTITUTE APPELLANT'S BRIEF OF TRACEY L. FARMER-CUMMINGS

Kevin D. Meyers, #34005
1125 Grand Ave., Suite 900
Kansas City, MO 64106
(816) 221-6420
(816) 283-3823 Fax

Charles W. Gotschall, #27744
4700 Belleview, Suite 215
Kansas City, MO 64112
(816) 561-2300
(816) 561-0760 Fax

ATTORNEYS FOR APPELLANT
TRACEY L. FARMER-CUMMINGS

JURISDICTIONAL STATEMENT

This is an appeal of an award of workers' compensation benefits issued by the Honorable Administrative Law Judge Kenneth J. Cain on May 24, 1999 against Future Foam, Inc. and Personnel Pool of Platte County as joint employers.

A timely appeal was filed by both claimant and Future Foam. The Labor and Industrial Relations Commission found that Personnel Pool was the immediate employer that provided workers' compensation insurance for the employee and that Future Foam, Inc., was the statutory employer. Otherwise, the Commission affirmed the award of the Judge Cain.

Claimant filed a timely appeal from the Commission's decision regarding the denial of permanent total disability and past medical benefits.

The Western District of the Missouri Court of Appeals affirmed the finding of the Commission of permanent partial disability but reversed the Commission's decision as to denial of past medical benefits. The Court of Appeals on May 30, 2001, remanded the decision to the Commission for determination of the proper amount of past medical benefits to be awarded Ms. Cummings.

On December 6, 2001, the Commission awarded the employee $118,581.99 in past medical benefits. The employer was awarded a credit of $56,659.33 in past medical benefits.

Claimant filed a timely appeal on the granting of a credit to the employer for "write-offs" in the Western District of Missouri.

On November 26, 2002, the Court of Appeals affirmed the finding of the Commission. A Motion for Rehearing and Application for Transfer was filed in the Court of Appeals on December 6, 2002, and both were denied on January 28, 2003. Employee/Appellant filed its

Application for Transfer to the Supreme Court on February 5, 2003. Thereafter on March 4, 2003, the Supreme Court sustained employee's Application for Transfer.

This Court has jurisdiction to entertain appeals on transfer from the Court of Appeals pursuant to Article V, Section 3 and Section 10 of the Missouri Constitution (1945) (as amended 1982). Therefore, jurisdiction of this Court over the instant appeal is invoked pursuant to Article V, Section 3 and Section 10 of the Missouri Constitution (1945) (as amended 1982) and Rule 83.02 of the Missouri Rules of Civil Procedure.

PROCEDURAL HISTORY

Tracey Farmer-Cummings filed her claim for compensation against Future Foam, Inc. on January 28, 1993 and an amended claim adding Personnel Pool of Platte County as an additional employer on March 1, 1993. The injury for occupational asthma occurred in October and November of 1991.

The hearing on the claim was held before Administrative Law Judge Kenneth Cain on February 24, 1999 through March 1, 1999.

On May 24, 1999 Judge Cain issued his award. He found that Personnel Pool was insured by Liberty Mutual Insurance Company and Future Foam was insured by Hartford. He found that the occupational disease was compensable under Chapter 287; that the date of onset of the occupational disease was October through November of 1991; that the employer received proper notice; that the occupational disease arose out of the employment; and that the claim was filed in a timely manner. Judge Cain awarded 320 weeks of permanent partial disability (80% to the body as a whole) from employer at a compensation rate of $113.33 per week for a total of $36,265.60. Judge Cain awarded future medical expenses and denied the majority of the past medical expenses. Judge Cain found that the employers, Future Foam and Personnel Pool, were joint employers.

Timely appeals were filed before the Labor and Industrial Relations Commission by claimant on the issues of disability and past medical expenses and by Future Foam regarding its status as a joint employer.

On February 22, 2000, the Commission entered its award. The Commission found that

under Section 287.040.4 a statutory employer shall not be liable if the immediate employer was insured and that Future Foam was a statutory employer. It further found that the award was subject to a Medicaid lien. The Commission then affirmed the award of Judge Cain.

A timely appeal was filed by claimant on the issues of denial of permanent total disability and the denial of past medical benefits.

The Court of Appeals on May 30, 2001 affirmed the award on permanent partial disability and reversed the award on past medical expenses. The Appeals Court then remanded the decision to the Commission for the proper determination of past medical benefits.

On December 6, 2001, the Commission awarded $118,581.99 for past medical benefits to employee and granted the employer a credit of $56,659.33 for "write-offs".

Claimant appealed this credit in a timely manner to the Appellate Court.

On November 26, 2002, the Court of Appeals affirmed the Commission's award of credits for "write-offs".

A motion for rehearing and in the alternative transfer to the Supreme Court was filed on December 6, 2002 and was denied on January 28, 2003.

On February 5, 2003, an Application for Transfer was filed to the Supreme Court on the basis of the credit for "write-offs" being contrary to Missouri law. On March 4, 2003, the Supreme Court sustained employee's Application for Transfer.

STATEMENT OF FACTS

The issue on appeal to the Supreme Court is the award of $56,659.33 in credits against $175,971.32 in past medical expenses. The Commission awarded the employer the credit on

the basis of "write-offs" or adjustments that occurred on the face of the original bills. The Commission did not award the $56,659.33 credit for payment by the employer. It is not disputed that the Employer/Insurer has made no payment to the employee and medical providers toward past medical benefits.

RELEVANT FACTS

TESTIMONY OF TRACEY FARMER-CUMMINGS

Claimant identified each and every bill she incurred and that the bills were related to her asthma. No evidence to the contrary was presented. (T105-137).

TESTIMONY OF DR. DAVID HOF

Dr. Hof was deposed twice. The first deposition was taken on 4/23/98 and a video deposition was also submitted. (Exhibit III). Dr. Hof testified regarding the causation of the accident and Tracey Farmer-Cummings' permanent disability.

Dr. Hof was deposed for a second time on 2/4/99. (Exhibit HHH) (T3440). Virtually the entire deposition was devoted to discussing the reasonableness and necessity of Tracey Farmer-Cummings' medical bills (T3440-3537).

None of the bills were challenged on the basis of "write-offs", partial liability or reasonableness or necessity. (T3540-3537).

MEDICAL BILL EXHIBITS

All of the medical bills were submitted without objection and virtually all of them were submitted with sworn affidavits from the healthcare providers. (Exhibits A-2, AA-LL, AAA,

BBB, T620-840, T841-1154, T3188-3189).

Due to the volume of material contained in the above exhibits, claimant made a summary of the exhibits. The summary of the medical bills is contained in claimant's exhibit KK. (T1134).

Exhibit KK was a summary sheet based upon the greater than 30 medical bill affidavits, the testimony of the claimant and the testimony of Dr. Hof. Exhibit KK was received into evidence without objection by Personnel Pool (T30,31).

EVIDENCE ON WRITE-OFFS

No testimony was presented as to various write-offs on the medical bills. No testimony was presented on the amount the healthcare providers discounted for Medicaid.

OBJECTIONS ON BILLS

No objections were raised below on the admissibility of the bills on the basis of write-offs, Medicaid, late-payment, reasonableness or necessity. Exhibit KK was reviewed for accuracy by Personnel Pool and objected to on the grounds of a $35.00 bill, but otherwise was agreed to without objection. (T30).

LIABILITY AS TO ORIGINAL MEDICAL BILLS

No testimony was presented below as to claimant being excused from liability from the original amounts of the healthcare provider billings. No testimony was presented as to the meaning of any adjustment that later occurred in the bills from original amount. No waiver or release excusing claimant from liabilities for the original billed amount occurs on the face of the bills.

COMMISSION'S FINDINGS ON BILLS

The Commission made inconsistent findings regarding the amount of past medical benefits due claimant , awarding $124,317.18 (p. 2) and later $118,581.99 (p. 4). Depending on which number is used, the Commission reduced the past medical as listed in Exhibit KK ($175,241.32 - $124,317.18 or $118,591.99) by $50,924.14 or $56,659.33.

The bulk of the reduction apparently was calculated from the amount of medical expenses that the medical providers took as a tax write-off to obtain Medicaid payment for the bills. The medical providers wrote off and made adjustments for Medicaid apparently in the amount of $33,902.53. (Commission decision, p. 3).

Apparently the remainder of the reduction was for medical bills that were stipulated to for St. Luke's Hospital for $61,287.74 for asthma related treatment. (Exhibit KK, T1134-1153). The Commission apparently reduced the St. Luke's Hospital bill of 3/4 - 3/8/94 from $30,454.36 to $16,735.96 with little explanation given in the text of their decision. (See Commission decision attachment p. 6). This reduction was presumably also for "write-offs.

The other credit given was for insurance company or HMO write-offs in the amount of $4,910.92. (Commission decision, p. 3, 4). The bills were also reduced $270.00 for the unnecessary bill to Trey Farmer and $824.00 for late payments.

Thus the following amounts can be determined from the Commission decision: Medicaid write-offs, $33,902.53; HMO write-offs $4,910.92, St. Luke's Hospital write-offs, $13,718.40; late payments $824.27; and Trey Farmer, $270.00. This amount is $53,626.12. From the Commission's decision it is impossible to discern the source of the other $2,763.21

in reductions.

In summary, the claimed amount of past medical was $175,241.32 (Exhibit KK). Claimant voluntarily reduces it $270.00 for simplicity for the Trey Farmer bill making the past medical claimed $174,971.32. The Appellate Court's and Commissions final award is $118,581.99. The credit that is awarded to the employer that is objected to is $56,389.33 or $174,971.32 - $118,581.99 = $56,389.33.

TABLE OF CASES

Wiedower v. ACF Industries, Inc., 657 SW2d 71, 75 (Mo. App. 1983)

Wilmeth v. TMI, Inc., 26 SW3d 476 (Mo. App. 2000)

Wilson v. Emery Bird Thayer, Co., 403 SW2d 953, 957 (Mo. App. 1966)

Young v. Frozen Foods Express, Inc., 444 SW2d 35 (Mo. App. 1969)

STATUTES:

Article 5, Section 3 of the Missouri Constitution of 1945, amended 1982

Article 5, Section 18 of the Missouri Constitution of 1945, amended 1976

Section 287.140 RSMo. 2000

Section 287.140.1 RSMo 2000

Section 287.140.3 RSMo. 1993

Section 287.220.5 RSMo. 1998

Section 287.270 RSMo. 1998

Section 287.491.5 RSMo.

Section 287.495 RSMo.

Section 287.495.1(1) RSMo.

MISSOURI SUPREME COURT RULES:

Rule 84.13(a)

POINTS RELIED ON

I. THE APPELLATE COURT ERRED IN AFFIRMING THE

LABOR & INDUSTRIAL RELATIONS COMMISSION'S FINDING THAT THE EMPLOYER WAS ENTITLED TO A CREDIT OF $56,119.83 FOR "WRITE-OFFS" BECAUSE UNDER SECTION 287.495.1 THE COMMISSION ACTED BEYOND ITS POWERS AND STATUTORY AUTHORITY IN THAT THE COMMISSION AWARDED THE EMPLOYER A $56,119.83 CREDIT FOR "WRITE-OFFS".

Soars v. Soars-Lovelace, Inc., 142 SW2d 866, 871 (Mo. 1940)

Section 287.270 RSMo.

Davis v. Carter Carburetor, Div. of Industries, Inc., 429 SW2d 738, 752 (Mo. 1968)

Wiedower v. ACF Industries, Inc., 657 SW2d 71, 75 (Mo. App. 1983)

II. THE APPELLATE COURT ERRED IN AFFIRMING THE COMMISSION IN FINDING THAT EMPLOYER/INSURER MET ITS BURDEN OF PROOF REGARDING CREDITS AGAINST EMPLOYEE'S REASONABLE PAST MEDICAL BENEFITS BECAUSE UNDER SECTION 287.495 THE COMMISSION ACTED IN EXCESS OF ITS POWERS AND SAID FINDING WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE IN THAT THE EMPLOYER/INSURER MADE NO PAYMENT TO

EMPLOYEE FOR PAST MEDICAL BENEFITS AND UNDER SECTION 287.270 IS THEREFORE NOT ENTITLED TO A CREDIT.

Section 287.270 RSMo.

Wilmeth v. TMI, Inc., 26 SW3d 476 (Mo. App. 2000)

Ellis v. Western Electric Co., 664 SW2d 639, 643 (Mo. App. 1984)

Wilson v. Emery Bird Thayer, Co., 403 SW2d 953, 957 (Mo. App. 1966)

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE COMMISSION BY AWARDING EMPLOYER A MEDICAID CREDIT IN THE AMOUNT OF $33,902.63 BECAUSE UNDER SECTION 287.495.1 THE COMMISSION ACTED BEYOND ITS POWERS AND STATUTORY AUTHORITY IN THAT THE $33,902.63 CREDIT WAS FOR "WRITE-OFFS" FOR MEDICAID PARTIAL PAYMENT.

Section 287.270 RSMo.

Wiedower v. ACF Industries, Inc., 657 SW2d 71, 75 (Mo. App. 1983)

Hendricks v. Ford Motor Corporation, 570 SW2d 702, 710 (Mo. App. 1978)

Mann v. Varney, 23 SW3d 231 (Mo. App.)

POINT I

THE APPELLATE COURT ERRED IN AFFIRMING THE LABOR & INDUSTRIAL RELATIONS COMMISSION"S FINDING THAT THE EMPLOYER WAS ENTITLED TO A CREDIT OF $56,119.83 FOR "WRITE-OFFS" BECAUSE UNDER SECTION 287.495.1 THE COMMISSION ACTED BEYOND ITS POWERS AND STATUTORY AUTHORITY IN THAT THE COMMISSION AWARDED THE EMPLOYER A $56,119.83 CREDIT FOR "WRITE-OFFS".

Argument

Standard of Review

"The award of the Commission is reviewed using a two-step evidentiary evaluation process to determine whether the Commission could have reasonably made its findings and award upon consideration of all the evidence before it." *Hunsicker v. J.C. Industries, Inc., 952 SW2d 376, 380 (Mo. App. W.D. 1997).* The reviewing court examines the record together with all reasonable inferences to be drawn from the evidence therein, in the light most favorable to the findings and award of the Commission, to determine whether they are supported by substantial and competent evidence. Id. If the court finds that the findings and award of the Commission are supported by substantial and competent evidence, the reviewing court must then determine whether the Commission's findings and award were nevertheless contrary to the overwhelming weight of the evidence contained in the whole record before the Commission. Id. The Commission is the sole judge of the credibility of the witnesses, and

thus the reviewing court is bound by Commission's determinations of credibility. *Bruflat v. Mister Guy, Inc., 933 SW2d 829, 835 (Mo. App. W.D. 1996).* "Decisions that are clearly interpretations or applications of law, rather than determinations of fact, are reviewed for correctness without deference to the Commission's judgment." *Hunsicker, 952 SW2d at 380*. The purpose of the Workers' Compensation Act is to provide a method of compensation for injuries sustained by employees through accidents arising out of and in the course of employment and to place the burden of such losses on the industry rather than the injured employee and employee's family. *Bethel v. Sunlight Janitor Service, 551 SW2d 616, 618 (Mo. banc 1977).* The Act is to be broadly and liberally interpreted in favor of the employee and "[a]ny question as to the right of the employee to compensation must be resolved in favor of the injured employee." *Minnick v. South Metro Fire Protection Dist., 926 SW2d 906, 909 (Mo. App. W.D. 1996).*

POINT I

The Appellate Court upheld the Commission in awarding the employer a $56,119.83 credit against employee's reasonable and necessary past medical bills in the amount of $174,971.32. The credit was awarded to the employer for past medical bills that had been adjusted for non-payment, insurance payment, Medicaid payment or otherwise as "write-offs".

"[T]he Workmen's Compensation Commission must find its authority to make awards in the Workmen's Compensation Act. Like other administrative tribunals, it is a creature of the Legislature and does not have any jurisdiction or authority except that which the Legislature

has conferred upon it. **If the authority conferred could be enlarged by its own holdings of waiver, estoppel, or even by contract, the Commission could itself add to its own powers and create rights and duties beyond what the Legislature provided or intended.**" *Soars v. Soars-Lovelace, Inc., 142 SW2d 866, 871 (Mo. 1940)* (emphasis added).

The statutory law is clear under Section 287.270 RSMo., which states:

> "No savings or insurance of the injured employee, **nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder.**" (emphasis added)

It is clear that the award of a $56,119.83 credit to the employer by the Commission cannot be upheld because "the Commission acted without or in excess of its powers." 287.495.1(l) RSMo. Awards of the Commission which are clearly the interpretation or application of the law are not binding on this Court and fall within the court's province of independent review and correction where erroneous. *Davison v. Research Medical Center, 903 SW2d 557, 571 (Mo. App. 1995).* And, where the findings of ultimate fact are reached not by a process of natural reasoning from the facts alone, but rather by application of law, it is a conclusion of law and subject to reversal by the court. Id.

The Commission and Appellate Court did not rely upon any statutory authority in granting the employer a $56,119.83 credit. The sole authority for granting the employer a

$56,119.83 credit was the "plan error rule" as stated in *Lenzini v. Columbia Foods, 829 SW2d 482, 487 (Mo. App. 1992).*

"The Commission must find its authority to make awards in the Workmen's Compensation Act" and not the "plan error rule". *Soars v. Soars-Lovelace, Inc.* at 871. If the authority conferred upon the Commission could be enlarged by laws enacted under the "plain error rule", the Court could add to the Commission's powers and create rights and duties beyond what the Legislature provided or intended. See e.g. *Soars* at 871. Soon the "plain error rule" would erode the Missouri Workmen's Compensation Act.

It is clear that the "plain error rule" has replaced the Missouri Workmen's Compensation Act in this case.

Prior to *Lenzini* and *Farmer-Cummings* the law was clear in this area. An employer had the burden of proving entitlement to a credit. *Point v. Westinghouse Electric Corp., 382 SW2d 436, 439 (Mo. App. 1964).* In order to be entitled to a credit against reasonable and necessary past medical expenses, the statutory law was clear -- the employer had to make the payment itself. It is not disputed that the employer has made no payment against past medical bills in this case. Further, the Court of Appeals has held that the $174,871.32 claimed in past medical expenses was reasonable and necessary. The Commission, the Court of Appeals and the Respondent have cited to no specific bill that is not reasonable or not necessary.

The Court of Appeals in this case held that "[t]he reason the Commission did not award Ms. Farmer-Cummings the full amount she requested was not because it found the medical bills to be unreasonable, unfair, or unnecessary. In fact, in its award, the Commission

specifically cited *Martin* and stated that Ms. Farmer-Cummings testified that each of her expenses were incurred in connection with her work-related injury and Personnel Pool did not object to those expenses on the basis that the expenses were unreasonable or unnecessary. Thus, the Commission implicitly acknowledged that under Martin, Ms. Farmer-Cummings presented a sufficient factual basis that the medical bills she incurred were reasonable, fair and necessary to treat her injury." *Farmer-Cummings* at p. 6.

The Supreme Court has held that "when such testimony accompanies the bills, which the employee identifies as being related to and the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the Commission to award compensation." See *Martin v. Mid-America Farm Lines, Inc., 769 SW2d 105, 111, 112 (Mo. banc 1989).*

The *Martin* court further stated that the employer may challenge the reasonableness or fairness of the bills or may show that the medical expenses incurred were not related to the injury in question. The employer in this case challenged none of the bills and in fact stipulated to the accuracy of the summary of the bills after a $35.00 bill correction was made (T20-37, 30, 31).

The Commission allegedly found a $270.00 bill to Trey Farmer which was not related to Tracey Farmer-Cummings' claim. (The Appellant voluntarily abandons this amount for the sake of clarification). Otherwise, no bill nor the medical summary of the bills has been challenged for inaccuracy or that it is not a necessary bill or that it is not a reasonable bill. Under *Martin* and *Point*, the burden has shifted to the employer to bring forward such

evidence.

Said evidence has not been presented by the employer. Nor has the employer presented any evidence of a payment. The sole justification for the $56,119.83 credit to the employer has been the "write-off" rule announced by the *Lenzini* court under the plain error rule.

The Court of Appeals under *Farmer-Cummings* enlarged the Commission's powers further by pronouncing that in order to claim entitlement to the original medical bill the employee has the burden to prove that the employee remains liable for the original amount of the bill. No authority is cited for this holding, not even the plain error rule.

If a write-off is merely a "computational error" that is simply a mathematical error as the Lenzini case held, then why must the employee become saddled with this additional burden of proof regarding past medical expenses? What new laws will be enacted to increase the Commission's powers under the plain error rulings of *Lenzini* and *Farmer-Cummings*?

If the holdings of *Lenzini* and *Farmer-Cummings* were so reasonable then why is no authority cited by the Court? If compelling authority existed it would be stated in the Missouri Workers' Compensation Act. Not one jurisdiction in the United States has been so bold as to ignore the State Workers' Compensation Statutes and enact a law through the plain error rule allowing an employer credit for a "write-off" by healthcare providers.

Missouri has long and consistently held that the Missouri "Compensation Law is wholly substitutional in character and cannot be altered by election, waiver, estoppel or contract." *Davis v. Carter Carburetor, Div. ACF Industries, Inc. 429 SW2d 738, 752 (Mo. 1968)*; *Griffin v. Dos, 411 SW2d 649, 650 (Mo. App. 1967).*

If the Compensation Law cannot be altered by "election, waiver, estoppel or contract", then the $56,119.83 credit awarded to the employer in this case cannot be upheld.

A "write-off" is irrelevant in the determination of what the employer's duty is to the employee. If the employer provided the medical treatment to the employee as it should have in this case, then the employer would have been responsible for the entire bill. The fact that an adjustment occurred years later to a bill is irrelevant to the question of the employer's duty to the employee under the Missouri Workers' Compensation Statute. The original and ongoing duty of the employer to the employee is a duty defined by Missouri statute and cannot be altered by election, waiver, estoppel or contract.

Further if a claimant accepts benefits from another source this does not estop him from asserting his rights to compensation under this act. See, *Davis v. Carter Carburetor, Division of ACF Industries, Inc. 429 SW2d 738, 752 (Mo. 1968).*

In *Wiedower v. ACF Industries, Inc. 657 SW2d 71, 75 (Mo. App. 1983)* the court held that the employee does not need to prove continued liability for the original medical bill. The fact that an employee may be liable for the original amount of the bill for past medical is enough to allow compensation for the bill under *Wiedower*. The *Wiedower* court held that "although making an award of such costs to an employee may result in a windfall, the insurance company may be entitled to reimbursement from the employee". *Wiedower v. ACF industries, Inc., 657 SW2d 71, 75 (Mo. App. 1983).* The *Wiedower* court held that this was enough to avoid any undue concerns of a "windfall" to the employee.

Finally, if we agree that the Commission must find its authority to act under the

Missouri Workers' Compensation Act, then the $56,119.83 award of a credit to the employer cannot be upheld. The Workers' Compensation Act does not grant the Commission this authority but specifically defines the Commission's authority regarding credits under Section 287.270.

It is not disputed that the employer paid nothing toward past medical in this case. It is clear that the Appellate Court found that claimant submitted sufficient evidence to prove $174,931.32 in past medical expenses.

It is clear that the commission should not rely upon the "plain error rule" to award benefits. It is also clear that the Appellate Court should not enlarge the Commission's powers by enacting laws through the plain error rule.

"We do not believe that it is necessary to remand the case to the Commission for additional findings as to medical bills. The Appellant-Employer makes no showing that the bills are not reasonable. Thus the Commission's order is not supported by substantial evidence on the record as a whole, and we may direct it to enter the order it should have entered." *Martin v. Mid-America Farm Lines, Inc., 769 SW2d 105, 112 (Mo. banc 1989)* citing *Johnson v. City of Duenwag Fire Dept., 735 SW2d 364 (Mo. banc 1987).*

For the above listed reasons, Appellant prays that this Court eliminate the $56,119.83 credit for "write-offs" and award the employee $174,971.32 in past medical expenses that have been proven as reasonable and necessary.

POINT II

THE APPELLATE COURT ERRED IN AFFIRMING THE COMMISSION

IN FINDING THAT EMPLOYER/INSURER MET ITS BURDEN OF PROOF REGARDING CREDITS AGAINST EMPLOYEE'S REASONABLE PAST MEDICAL BENEFITS BECAUSE UNDER SECTION 287.495 THE COMMISSION ACTED IN EXCESS OF ITS POWERS AND SAID FINDING WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE IN THAT THE EMPLOYER/INSURER MADE NO PAYMENT TO EMPLOYEE FOR PAST MEDICAL BENEFITS AND UNDER SECTION 287.270 IS THEREFORE NOT ENTITLED TO A CREDIT.

It is not disputed that Employer/Insurer has paid employee no benefits in this case. (Tr. 136). Missouri Workers' Compensation statutory and case law states clearly that the employer is not entitled to a credit for amounts not paid by Employer/Insurer.

Section 287.270 RSMo., 1998, provides in pertinent part:

> "No savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder..."

Credit is allowed for payments made "on account of the injury" rather than as a result of an agreement extraneous to requirements of the Workers' Compensation Law. *Wilmeth v. TMI, Inc., 26 SW3d 476 (Mo. App. 2000)* citing *Evans v. Missouri Utilities Co. 671 SW2d*

812, 815 (Mo. App. 1984). In *Ellis v. Western Electric Co., 664 SW2d 639, 643 (Mo. App. 1984)* the court stated that:

> "[t]his seems to be in accord with other analogous situations. The burden of proving payment is on the party asserting it... We think it is only reasonable to put the burden of showing facts entitling it to credit on the employer. The question then is whether this burden was met..."

"Payments from an insurance company or from any source other than the employer or the employer's insurer for liability for Workmen's Compensation are not to be credited on Workmen's Compensation benefits." *Ellis v. Western Electric Co., 664 SW2d 639 (Mo. App. 1984).*

The parties stipulated to $175,241.32 in past medical expenses. (Tr. 30-31). The Commission correctly upheld and enforced this stipulation even when minor discrepancies appeared in the record. (Commission decision p. 19). Employer/Insurer presented absolutely no evidence of payment or benefits paid by Employer/Insurer to the employee or to the medical providers. Thus, Employer has presented no evidence entitling it to a credit under Missouri law.

The duty of the employer to provide medical treatment to the employee is unqualified and absolute. *Wilson v. Emery Bird Thayer, Co., 403 SW2d 953, 957 (Mo. App. 1966).* If the employer "refuses or neglects to provide or tender necessary medical or hospital treatment,

the injured employee need not lie helpless or in pain; but, in such circumstances, the employee may procure necessary treatment... and have an award against the employer for the reasonable cost thereof." *Wilson* at 957 (citations omitted).

The order should reflect the past medical expenses proven of record by the employee as reasonable and necessary in the amount of $174,971.32 (less $270.00 for Trey Farmer). The Commission award of credits to the employer of $56,389.33 was erroneous and contrary to Missouri law when the record is clear that Employer/Insurer did not pay employee or the health providers anything.

Minor discrepancies in the medical bills were waived by the stipulation and may not be raised for the first time on appeal. Rule 84.13(a). The Commission's duty is to remain impartial and not to become an advocate for the employer. The $56,389.33 reduction was not paid by the employer or insurer. Missouri statutory law (Section 287.270) and case law (*Wilmeth, Evans, Ellis*) is clear that in order to obtain a credit against reasonable medical bills the Employer/Insurer must pay the amount for the credit.

POINT III

THE COURT OF APPEALS ERRED IN AFFIRMING THE COMMISSION BY AWARDING EMPLOYER A MEDICAID CREDIT IN THE AMOUNT OF $33,902.63 BECAUSE UNDER SECTION 287.495.1 THE COMMISSION ACTED BEYOND ITS POWERS AND STATUTORY AUTHORITY IN THAT THE $33,902.63 MEDICAID CREDIT WAS FOR

"WRITE-OFFS" FOR MEDICAID PARTIAL PAYMENT.

The Commission erred in allowing employer a credit for $33,902.53 for Medicaid write-offs for past medical expenses that were proven to be reasonable and necessary to cure and relieve employees work related condition.

Section 287.270 RSMo. 1998 states:

> "No savings or insurance of the injured employee, **nor any benefits derived from any other source than employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder**;" (emphasis added)

The Commission erred in allowing Employer/Insurer a credit for $33,902.53 for tax write-offs because the healthcare providers accepted Medicaid payments. The initial medical bills the write-offs were credited against were proven reasonable and related to the work injury.

Section 287.140 RSMo. 2000 provides in pertinent part, that:

> [I]n addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, <u>as may reasonably be required after the injury or disability</u>, to cure and relieve from the effects of the injury. '287.140.1 RSMo. 2000.

In cases where the employer has initially denied liability, the courts have affirmed awards of medical costs to the employee. *Wiedower v. ACF Industries, 657 SW2d 71 (Mo. App. 1983).* This Court held Ms. Farmer-Cummings was forced to get her own medical treatment. "Moreover, a significant portion of Ms. Farmer-Cummings' medical bills incurred after January 1993, were also a result of her continued need for emergency medical treatment, and thus it would not have been possible for Personnel Pool to select the health care provider." See *Farmer-Cummings v. Future Foam, 44 SW2d 830 (Mo. App. 2001).*

See *Schutz v. Great American Ins. Co., 103 SW2d 904, 910 (Mo. App. 1937),* when the Court quotes the general rule that:

> "[W]here the employer has neglected or refused to provide the necessary services or treatment, or has consented affirmatively, or his consent is to be inferred from his inaction, to selection by the employee, or, having knowledge of such selection, has interposed no objection, or where the physician selected by the employer is not available when required, the employee may make his own selection, the fees and expenses to be charged to the employer if they are reasonable."

The law is well settled on this point that if the medical bills are reasonable, then the employer is liable for them. *Hendricks v. Motor Freight Corporation, 570 SW2d 702, 710 (Mo. App. 1978).* Employer made no showing the bills were unreasonable.

When the employer refuses and neglects to provide the necessary treatments the employee need not lie helpless and in pain but may procure the necessary treatment and have an award against the employer for the reasonable cost thereof. *Wilson v. Emery Bird Thayer Company, 403 SW2d 953, 957 (Mo. App. 1966).*

When the employee is forced to rely upon Medicaid for payment of her medical bills because the Employer/Insurer refuses to provide the care they are unqualifiedly and absolutely liable for under Section 287.140 then the Employer/Insurer should not benefit for said denial of medical treatment.

The Commission erred in relying upon *Mann v. Varney, 23 SW3d 231 (Mo. App. 2000*) in granting a Medicaid credit because the sole authority for the *Mann* holding is the "write-off" rule announced in *Lenzini*. *Mann* is the first case that followed *Lenzini's* plain error ruling on "write-offs". No transfer to the Supreme Court was applied for in *Mann*.

The *Mann* court does not cite to any specific statutory language justifying the holding. *Mann* is factually distinguishable from the present case. In *Mann* the parties agreed that the claimant was only to be held liable for what Medicaid paid the healthcare providers. And, the Second Injury Fund paid this amount. In *Mann* the Second Injury Fund was the defendant and there was no insurance. The *Mann* court held that Statute 287.270 did not apply to the Second Injury Fund presumably because the Second Injury Fund was not the employer.

Contrariwise, in this case there is no agreement between the parties as to the liability of claimant for the bills Medicaid did not pay. There is no proof whatsoever on this issue and it was not raised in the trial court. In this case, the employer had insurance and the Second

Injury Fund is not involved. Finally, it is clear that Section 287.270 not only applies in this case but is the controlling law.

Also, in *Mann* the Court stated that the *Wiedower* opinion did not apply as the *Wiedower* court did not analyze the statute on the Second Injury Fund, Section 287.220. The *Wiedower* opinion applies in this case as does its analysis.

Because *Mann* is so factually distinguishable from the present case the holding is virtually irrelevant. However, the *Mann* court's sole authority for its holding was the *Lenzini* plain error ruling on write-offs. As such, it is highly questionable as to whether the holding is justified as no statutory authority is explicitly cited.

As stated above, the Commission must find its authority in the statute and its powers should not be increased by election, contract, waiver or estoppel. The Commission should not add to its own powers nor should the Appellate Court add to these powers through the plain error rule.

Thus, the *Lenzini* holding has given rise to the *Mann* holding and now the *Farmer-Cummings* holding saddling claimant with the burden of proof as to "actual medical bills". Would the *Mann* court have held the same way had the record been silent as to employee's liability as to the past medical aid? Where is the statutory justification for the holding in *Mann*?

WHEREFORE, Appellant prays that the Commission's credit to the employer for Medicaid "write-offs" be overruled as beyond the scope of the Commission's powers and no justification in law or fact.

CONCLUSION

The legal justification for the $56,389.33 credit given to the employer by the Court of Appeals and Commission is the "plain error rule". It is unclear as to why the Court of Appeals and Commission refuse to follow Section 287.270 of the Missouri Workers' Act.

What is clear is that if this plain error law of *Lenzini* is allowed to stand no employer will ever pay an employee's medical bills because of the economic incentives awarded under this new law.

The only windfall in this case has been the employer/insurer's ability to deny medical treatment in the amount of $174,971.32 to Tracey Farmer-Cummings who has suffered severe health consequences as a result and to be rewarded for this by the Western District of Missouri. Not only has the employer been encouraged by the Western District to refuse medical treatment, new laws have been pronounced to justify this. The Western District has actually encouraged employers to deny medical aid through legal pronouncements "cloaked" under the plain error rule.

This accident occurred in 1991 and due to her health condition, my client prays for a just ruling and an expedited hearing and decision. Appellant requests oral argument.

Respectfully submitted,

_____
KEVIN D. MEYERS #34005
1125 Grand Ave., Suite 900215

Kansas City, MO 64106
(816) 221-6420
(816) 283-3823 Fax

_____
CHARLES W. GOTSCHALL #27744
4700 Belleview, Suite 215
Kansas City, MO 64112
(816) 561-2300
(816) 561-0760 Fax

ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kevin D. Meyers, hereby certify as follows:

1. The attached brief complies with the limitations contained in Supreme Court Rule 84.06. The brief was completed using Microsoft Word 95, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification and the certificate of service, the brief contains 6,455 words, which does not exceed the 31, 000 words allowed for an Appellant's brief.

2. Pursuant to Special Rule XXXII, the disk filed with this brief contains a copy of this brief. It has been scanned for viruses using Norton Antivirus 2001 program. According to that program, this disk is virus-free.

3. One true and correct copies of the attached brief, appendix and a disk containing a copy of this brief were mailed, postage prepaid to: Stephanie Warmund, 9200 Ward Parkway, Suite 300, Kansas City, Missouri, 64114, attorney for Liberty Mutual Insurance Company and Personnel Pool; [Richard Magruder, Esq. and John Mohan, Esq. represented Future Foam, who was dismissed from this case and thus are no longer parties of record], on this _____ day of

_____, 2003.

_____

Kevin D. Meyers MO Bar No. 34005